

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

Legal Services of Central New York, Inc.

Employer

and

Case 3-UC-517

**Legal Services of Central New York
Lawyers Association, a Unit of the National
Organization of Legal Service Workers,
International Union UAW, Local 2320¹**

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² I find:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The parties stipulated, and I find, that Legal Services of Central New York, Inc. (herein the Employer) is a not-for-profit organization with its main office and place of business located in Syracuse, New York, where it is engaged in providing legal services. During the past twelve months, the Employer, in conducting its business operations, derived gross revenues in

¹ The name of the Petitioner appears as amended at the hearing.

² Post-hearing briefs were filed by the Employer and Petitioner, and have been duly considered.

excess of \$250,000 from such operations, and purchased and received at its Syracuse, New York facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulated, and I find, that Legal Services of Central New York Lawyers Association, a Unit of the National Organization of Legal Services Workers, International Union UAW, Local 2320, the Petitioner herein, is a labor organization within the meaning of Section 2(5) of the Act.

The Petitioner filed the instant unit clarification petition on November 2, 2005, seeking to clarify the existing bargaining unit of Employer's employees which it represents, to include three positions created during the course of a reorganization of the Employer's operations on January 1, 2004: 1) the Director of Advocacy; 2) the Director of Special Advocacy; and 3) the Director of the Disability Advocacy Program. The Petitioner contends that these newly created positions should be included in the existing bargaining unit because the individuals at issue perform the same duties as unit employees. The Employer contends that the positions are supervisory and/or managerial in nature, and therefore should be excluded from the unit.

As set forth below, I have concluded that the Director of Advocacy and Director of Special Advocacy exercise indicia of supervisory authority within the meaning of Section 2(11), and that the Director of Advocacy and the Director of the Disability Advocacy Program are managerial employees. Accordingly, I shall dismiss the unit clarification petition.

FACTS

I. Reorganization and Operational Overview

The Employer provides civil legal representation to low income clients and individuals with various mental and physical disabilities. The Employer's legal services are funded by contracts with state agencies, private grants and fellowships. The Employer's Executive Director,

Dennis Kaufman, is responsible for day-to-day operations. The Legal Aid Society of Mid New York (herein LASMNY) is a private non-profit legal services provider. The Employer and LASMNY provide overlapping services for an area covering thirteen counties in central New York State.

The Petitioner and Employer have had a longstanding collective-bargaining relationship since about the mid-1980's. The Employer and Petitioner have been parties to several successive collective-bargaining agreements, the most recent of which was effective from January 1, 2003 to December 31, 2005. The parties stipulated that there are approximately 10 employees in the existing bargaining unit. Article 1, Section 1.1 of the most recent collective-bargaining agreement states that the Petitioner is the sole and exclusive bargaining representative for all staff attorneys and law graduates employed by the Agency. The parties stipulated at the hearing that the appropriate unit consists of all staff attorneys and law graduates employed by the Agency, excluding the Executive Director, Litigation Director, and Managing Attorneys. As of the hearing in this case, the Employer had not filled the Litigation Director and Managing Attorney positions.³

The Employer and LASMNY entered into an extensive operational reorganization effective January 1, 2004. Prior to the reorganization, the Employer served as a grantee of the Federal Legal Services Corp., a federal entity that provides funding to legal services agencies. Federal Legal Services Corp. prohibited grantees from engaging in class action law suits, legislative or

³ Section 1.4 of the agreement also states that the term staff attorney does not include the Executive Director or Litigation Director. Section 1.4 also states that nothing precludes the Executive Director from appointing a Managing Attorney or attorneys for the Onondaga, Jefferson, Cayuga, Cortland, or Oswego County offices who would not be members of the bargaining unit.

administrative rule-making lobbying, and from seeking attorney's fees. After the reorganization, LASMNY, rather than the Employer, became the primary Federal Legal Services grantee.⁴

The Employer restructured itself into three units: 1) the Disability Practice Group (DPG), which consists of the Protection and Advocacy Unit (P&A Unit) and the AIDS Law Project; 2) the Special Advocacy Unit (SAU); and 3) the Disability Advocacy Program, also referred to as the Disability Assistance Project (DAP).

The P&A Unit consists of six staff attorneys and one law graduate who provide civil legal representation to disabled individuals pursuant to grants from the New York State Commission on Quality of Care, including grants for particular developmental or mental disabilities. The AIDS Law Project, which consists of one unit staff attorney, provides civil legal services to people with HIV, who reside in counties in Central and Northern New York.

The Employer specifically created the SAU to pursue representational and advocacy matters for low-income status clients, such as class action lawsuits, that had been restricted by the Federal Legal Services Corp. The SAU, which consists of a director and two unit staff attorneys, receives much of its funding from the interest on lawyer account fund grants.

DAP is a New York State-funded unit that provides civil legal representation to supplemental social security income and social security disability claimants. The Employer, after the reorganization, continued to serve as the prime contractor for this funding through the

⁴ Prior to the reorganization, the Employer employed a total of approximately 30 employees at its Syracuse, New York, headquarters and its branch offices in New York State. The Employer employed three managing attorneys in Syracuse, Watertown, and Oswego, New York, each of whom was excluded from the bargaining unit. Pursuant to the reorganization, the Employer shifted about half its staff, approximately twelve employees, including eight staff attorneys, to LASMNY. Since the reorganization, the Employer has maintained one office in Syracuse, New York, and no longer maintains its branch offices. LASMNY assumed control of the Employer's satellite operations and their respective employees. LASMNY transferred one employee, Paul Lupia, to the Employer, where he became the Director of Advocacy. The Employer maintains a cooperative buy-back agreement with LASMNY, enabling the Employer's employees to utilize LASMNY offices. After the reorganization, the Employer's former employees who transferred to LASMNY continue to be represented by the Petitioner, but in a separate bargaining unit.

DAP contract, but subcontracts with LASMNY to provide the legal services for this project. The Empire Justice Center, on behalf of New York State, oversees the DAP contract. The Employer and LASMNY entered into a June 28, 2004, memorandum of agreement regarding the DAP contract, which states that the Employer shall employ a director of DAP, who shall generally oversee the operation of the contract to provide representation to claimants. The director of DAP is the only employee employed by the Employer in DAP. The other DAP attorneys are LASMNY employees.⁵

On January 1, 2004, the Employer hired Paul Lupia, a former LASMNY managing attorney, as its Director of Advocacy. Through an agreement with LASMNY, Lupia also serves as managing attorney for LASMNY. The Director of Advocacy is responsible for the three units: DPG, SAU and DAP. In addition, the Employer, as of January 1, 2004, hired Eric Tohtz as the Employer's Director of SAU. Tohtz was a managing attorney for the Employer from 1991 to January 1, 2004. The Employer also hired Christopher Cadin as Director of DAP. Cadin had been a managing attorney for the Employer, and a staff unit attorney for the Employer since 1991.

II. Paul Lupia: Director of Advocacy

Executive Director Kaufman testified that after the reorganization, he filled the vacant Litigation Director position, and changed the title to Director of Advocacy, in order to better effectuate the Employer's newly enhanced role in legislative advocacy and administrative law lobbying. Kaufman testified that Lupia performs many of the duties set forth in the description

⁵ The Employer, in its post-hearing brief, acknowledges that the director of DAP is not a supervisor within the meaning of Section 2(11) of the Act.

for the Litigation Director position, a position formerly excluded from the bargaining unit.⁶

Although the organizational chart depicts the DPG, DAP, and SAU units as reporting to Lupia as the Director of Advocacy, the SAU unit employees also report directly to the Director of SAU Tohtz. Lupia manages and supervises litigation by formally participating in case review meetings, as well as by meeting individually with staff attorneys on their cases. Lupia testified that it is his responsibility to review the unit employees' litigation.

Lupia works primarily out of his LASMNY Utica office.⁷ He travels to Syracuse approximately five or six times a month to attend P&A and SAU unit meetings, to discuss cases with employees, and to attend Employer board of directors and management meetings. Lupia was working on three agency cases of his own at the time of the hearing.

Since January 1, 2004, the Employer has hired James Williams as a P&A unit attorney, Mary Traynor as the AIDS Law Project attorney, and David Delameter as an SAU attorney.

⁶ Kaufman testified that Director of Advocacy has authority to perform the following duties outlined in the Litigation Director job description: 1. supervise and manage the litigation of the agency to insure the delivery of high quality and aggressive legal services to its clients; 2. conduct periodic case reviews with attorneys and paralegals in the agency to insure overall quality of work and compliance with Legal Services of Central New York's policies and procedures; 3. In conjunction with the Executive Director and other supervisory staff, conduct periodic evaluations of staff; 4. Work with the Executive Director, other management and the senior attorneys to formulate policies, procedures, and standards relevant to legal work; 5. Work with the Executive Director and other management in formulating general policies of the agency; 6. In conjunction with the Executive Director, develop a plan to encourage and support major litigation in the office. Report to the Executive Director and Board of Directors periodically concerning the litigation plan and the agency's success in achieving the goals set by that plan; 7. Take the lead in establishing a litigation strategy for the agency and its substantive units; 8. Work with substantive units and individual attorneys on general litigation strategies and individual case strategies, and co-counsel with staff when necessary and appropriate on major cases; 10. Work with the senior attorneys to monitor case acceptance and rejection policies of the units; 11. Serve as a resource person for litigation questions from staff; 12. Assist the Executive Director in the recruitment and selection of staff; 13. Consult with and assist the Executive Director in the overall administration of Legal Services of Central New York including, but not limited to, the preparation of the annual budget, funding proposals, and case reports; 15. Work with community and bar groups as necessary; 17. Direct day to day operations of the agency in absence of the Executive Director; 18. Insure compliance with Legal Services of Central New York's procedures and policies; 19. Assist the Executive Director when necessary in personnel and union relations matters; 20. Perform any other reasonable duties as issued by the Executive Director.

⁷ Under the agreement between the Employer and LASMNY, the Employer pays Lupia's salary, and LASMNY reimburses the Employer for time that Lupia devotes to LASMNY duties.

Per agreement with LASMNY, James Murphy, a LASMNY employee and former unit employee, transferred to an SAU attorney position as of January 1, 2005.⁸

The Litigation Director job description states the position assists the Executive Director in the recruitment and selection of staff. Kaufman testified that he encouraged Paul Lupia to candidly offer his independent assessment of job candidates, which Lupia did in connection with hiring for general job vacancies.⁹ Executive Director Kaufman, Paul Lupia and Director of Special Advocacy Eric Tohtz (for the purpose of hiring an attorney for the SAU position) testified that they jointly participated in the hiring process, and that they agreed with one another as to whom they would hire.

Lupia, Tohtz (for the SAU position) and Kaufman collectively reviewed and screened resumes, interviewed candidates, ranked candidates and jointly decided to offer positions to candidates. Lupia testified that he, along with Kaufman and Tohtz, (for the purposes of the SAU position) reviewed approximately 15-20 resumes and interviewed approximately three or four candidates for each open position. After the interviews, Lupia conducted applicant background checks by himself. After each interview, Kaufman, Lupia and Tohtz (for the SAU position) ranked each candidate, and agreed on the top person to be extended consideration. Kaufman, Lupia and Tohtz all, by consensus, decided to extend an employment offer for the SAU position, first to one candidate, who rejected the offer, then to another candidate, who accepted the job offer.

⁸ The record reflects that the Employer hired law school graduate, Julie Morris in the P&A unit; however, the record does not reveal the details or date of her hiring. Kaufman and LASMNY's Executive Director, upon approval by the board of directors, decided that James Murphy, a staff attorney who had been moved from the Employer to LASMNY on January 1, 2004, should be transferred to the Employer on January 1, 2005 as a member of the Special Advocacy Unit. James Murphy continues to provide services for LASMNY, as well, even though he is a unit employee. Kaufman characterized Murphy's move as a transfer. Kaufman testified that the decision was limited to the Executive Directors and the board of directors, and that Tohtz did not play any role in the transfer of James Murphy from LASMNY to the Employer. The record does not reflect that Lupia played any role in this transfer.

⁹ There was one job opening in the P&A unit, one in the AIDS Law Project, and one job opening in the SAU.

Job candidates also meet with a group of staff attorneys during the interview process, in accordance with the collective-bargaining agreement.¹⁰

Executive Director Kaufman testified that Lupia possesses the authority to recommend discipline for any unit employee, and that he would give that recommendation “great weight.”¹¹ The parties stipulated at the hearing that the Employer has only formally disciplined one individual, SAU attorney David Delameter, during the pertinent time period. Lupia was not directly involved with the disciplinary action taken involving Delameter, which was handled primarily by Tohtz and Kaufman.

The P&A unit conducts a weekly meeting where unit attorneys present particular cases for advice and consideration.¹² The record discloses that not all P&A subject matter cases filed with the Employer are brought to the P&A unit meeting for discussion or review. The Employer receives potential cases from a variety of sources, including an intake voice message service, as well as direct contacts from outside attorneys or previous clients. P&A attorneys are assigned intake duty on a rotating basis, and refer voice messages and other information to the proper individuals based on the subject matter, grant, or geographic area of the assignment. For example, the record reveals that if it were clear that the Employer would handle the subject matter of a case, then the intake attorney would simply refer the case to the appropriate unit attorney handling a particular grant. If the case involves an area outside of the Employer’s subject matter, such as a case not covered by any particular grant, the P&A attorneys can, on their own initiative, decide to accept the case.

¹⁰ The collective-bargaining agreement, Article 8.4 discusses the process whereby a committee of three staff attorneys selected by the Union is permitted to separately interview candidates and express views on the candidate prior to a final selection decision. The collective-bargaining agreement states that the provision should not impair the Employer’s ultimate authority in making a final selection decision. The contract and the record does not indicate that the staff attorney committee possesses any authority to make a hiring decision, beyond providing input.

¹¹ Lupia testified that because Tohtz, the Director of SAU served as a “primary supervisor,” Tohtz possessed the primary responsibility for discipline in his unit.

¹² Tohtz and Mary Traynor, AIDS Law Project attorney, also attend these meetings.

For those cases that are within the Employer's subject matter authority, the attorneys collectively discuss at the weekly P&A meetings whether or not to take the case, with the ultimate authority on that issue resting with Executive Director Kaufman, who chairs the meetings. If Kaufman is absent, Lupia serves as the chair person of the P&A meetings. Kaufman testified that during the course of the meetings, he or Lupia, occasionally decide to cease further processing of a case. Lupia also attends the bi-weekly SAU meeting, together with Kaufman, Tohtz and the SAU staff attorneys. During these meetings, the attorneys address cases that were referred from LASMNY and cases received from other sources.

Lupia testified that immediately after the Employer's reorganization, he individually met with approximately three or four P&A unit employees to discuss their caseloads and to review their cases. Lupia testified that he sought to introduce himself to the unit employees, accurately assess the cases being processed, evaluate legal strategies, and determine if the cases could generate attorney fees. The record reflects that after the weekly P&A meetings, Lupia regularly meets individually with P&A unit attorneys to discuss their cases. The P&A unit attorneys also consult with Lupia at other times when they have procedural or substantive questions concerning their cases.

Some unit employees testified that the Employer has not identified Lupia as their direct supervisor. However, Traynor testified that, during the course of her employment interview, Lupia was described as her litigation supervisor. In or about spring or summer 2005, Traynor informed other unit employees that Kaufman had described Lupia as the director of litigation.

The record reveals many instances in which Lupia has assigned cases and has directed case management. For example, although Lupia testified that he never directed an employee to accept a particular case, P&A unit attorney Greeley testified that she observed Lupia direct P&A attorney David Hutt to accept a potential Client Assistance Program case that he presented during the course of a P&A meeting. The record does not indicate if Kaufman was present on this occasion.

Lupia testified that he receives numerous e-mails and questions every week from unit employees. The record reflects that unit employee Mary Traynor submitted a February 7, 2005 detailed e-mail to Lupia regarding substantive legal inquiries with a subject heading: “questions for my litigation supervisor.” Traynor testified that she has never referred to any other employee as her litigation supervisor.¹³ Lupia testified that such an e-mail was typical of other e-mails he received requesting advice or strategies regarding litigation. Lupia testified that he conferred with Traynor after receiving the e-mail. The record also discloses that P&A unit attorney Williams discussed with and then sent Lupia a draft of an order to show cause and a cross motion for Lupia’s review.

Williams also sought Lupia’s advice on November 14, 2005 regarding whether to file an Article 78 pleading. Williams testified that Lupia suggested he make changes to the pleadings to ensure that the issue was addressed at the lower court without inviting an appeal. Lupia testified that as a result of Lupia’s feedback, Williams changed the documents. Lupia testified that if Williams had disagreed with his suggestions, he would have eventually directed Williams to follow his advice.¹⁴ David Hutt, a P&A unit attorney, sent an e-mail to Lupia regarding whether Hutt should inform an attorney working for a New York State agency about the potential filing of an appeal. According to Lupia, they jointly decided that Hutt should contact the agency attorney about the case. Lupia has worked on and assisted unit attorneys with their cases.¹⁵

The record establishes that Lupia does not approve time off requests, training requests, vacation requests, or travel vouchers. Rather, Executive Director Kaufman approves such requests for all units. Kaufman testified that Lupia has the authority to evaluate employees, however the

¹³ Traynor testified that she consulted with Lupia about the matters contained in the e-mail because of his expertise in family law. She testified that she put “questions for my litigation supervisor” as an “ironic” attempt to get Lupia’s attention. However, Traynor also testified that the e-mail contained the type of questions that she would ask a managing attorney.

¹⁴ Williams asserts that he turned to Lupia on this matter due to Lupia’s professional expertise in family law, and that such a consultation was similar to his other consultations with colleagues settling their professional judgment.

¹⁵ For example, when unit employee James Murphy went on vacation, Lupia took over a writ of habeas corpus petition in Fulton County, and argued the case in court. Lupia testified that he assisted Hutt in drafting a brief to a U.S. Court of Appeals on a major class action law suit involving a New York State agency.

Employer has no formal evaluation systems for its staff attorneys. The record establishes Lupia does not address union grievance matters.

Since the beginning of 2005, Lupia has participated in management team meetings between the Employer and LASMNY. These meetings are attended by Kaufman, Dan Altwerg, managing attorney for LASMNY and Robert Salzman, LASMNY Executive Director. Lupia testified that in such meetings he has facilitated the resolution of issues between the two agencies. During the course of these meetings, the participants discussed negotiation strategy for the Employer's and LASMNY's upcoming collective-bargaining negotiations with Petitioner. The record reveals that Lupia at these meetings provided input into the consideration of whether the agencies should engage in joint bargaining with the Petitioner, (an issue which was ultimately submitted to counsel for advice), and participated in deliberations over which agency's collective-bargaining agreement to address first during collective-bargaining negotiations.

During the course of an October 31, 2005, management team meeting, Kaufman designated Lupia to serve as the Employer's spokesperson concerning its litigation position in meetings with a coalition of independent living centers and legal service providers that addressed the impact of recent caselaw and Medicaid considerations.¹⁶

The October 31 management team meeting between the Employer and LASMNY also addressed staffing issues, funding for a legal help telephone line, sharing arrangements between the Employer and LASMNY regarding particular employees, a discussion about payments to the

¹⁶ Lupia testified he expressed at one of these meetings that the Employer would be interested in related litigation if the appropriate case appeared. Bargaining unit employees have also attended these coalition meetings, but the record does not reflect these attorneys served as spokespersons for the Employer's policy. The record reflects that bargaining unit employee Julie Morris serves on the coalition steering committee, and that her particular grant requires her to work on the issues addressed by the coalition. The Employer is not bound by the recommendations of the coalition or its steering committee.

Rural Law Center, and a future approach to dealing with organizational conflicts between the Employer and LASMNY. A scheduled agenda for a December 19, 2005 management meeting between the two agencies reflected similar issues.

Lupia represented both the Employer and LASMNY during a meeting of the Committee on Training Leadership and Diversity, a state-wide committee composed primarily of executive directors from various legal aid entities. The committee deals with issues such as whether monies from attorney account fund grants should be expended on training.

Lupia, as described in the Litigation Director job description, is responsible for developing a plan to encourage and support major litigation in the office. He has made decisions regarding whether the Employer should be involved in certain types of class action litigation.

Lupia and SAU Director Tohtz have made several trips to meet with LASMNY employees. The purpose of these trips was to clarify and effectuate the referral of appropriate cases by LASMNY employees to the Employer. Lupia served as the primary spokesperson during these meetings, which were intended to promote litigation opportunities.

Kaufman testified that Lupia is responsible for conducting the Employer's day-to-day operations in his absence. Lupia testified that he performs Kaufman's duties when Kaufman is on vacation.¹⁷ Kaufman informs the unit attorneys that Lupia will be attending P&A unit meetings if Kaufman is going to be absent from meetings.

III. Eric Tohtz: Director of Special Advocacy Unit

Since the reorganization, Eric Tohtz, the Director of SAU, has worked from his home in Oswego, New York, but has also regularly traveled once or twice a week to the Employer's Syracuse office. The SAU consists of James Murphy, a highly experienced attorney in the

¹⁷ Kaufman testified that he took a two- or three-week vacation in July or August 2005, and that he sent an e-mail to staff attorneys to notify them to report to, or direct any questions to Lupia in his absence. The record does not indicate to which staff attorneys Kaufman sent the e-mail. Lupia also recalled Kaufman sending an e-mail to that effect. However, the other witnesses did not recall receiving such an e-mail.

Cortland office, and David Delameter, a newly hired attorney in the Syracuse office.¹⁸ While at the Syracuse office, Tohtz typically attends the bi-weekly SAU meetings, attends the weekly P&A meetings when he is able to do so, meets with SAU employees Murphy and Delameter, meets with Kaufman, and handles his own cases which he obtains from outside sources.¹⁹ The record establishes that there is no written description of Tohtz' job duties.

As discussed above, the record indicates that Tohtz, along with Kaufman and Lupia, collectively evaluated resumes for the SAU position, interviewed and ranked candidates, and Tohtz testified that Kaufman, Lupia and himself jointly decided whom to hire. Tohtz, along with Kaufman and Lupia decided, by consensus, to extend a job offer to the first choice candidate for the SAU position, and then to extend the position to an individual who received a "lukewarm" reference. Kaufman and Lupia testified that the Employer purposely included Tohtz in the hiring of the SAU position because the newly hired employee would report directly to Tohtz. The record does not indicate that Tohtz has been involved in any other hirings by the Employer.

Kaufman testified that Tohtz has the authority to discipline or discharge employees in the SAU, and that he would give "great weight" to any recommendations by Tohtz in that regard. Tohtz testified that he understood he possessed the authority to recommend discipline or discharge of SAU employees.

The record establishes that Tohtz disciplined and effectively recommended discipline of David Delameter. In about mid-2005, Delameter started exhibiting numerous work performance issues. Tohtz testified that he provided informal counseling, and offered assistance over several

¹⁸ At the time that Tohtz became Director of the SAU, there were no employees in the SAU unit. As discussed above, Murphy transferred into the unit within the first year, and the Employer hired Delameter during the same year.

¹⁹ Tohtz testified that he spent 60 to 70 percent of his time on his own agency cases, and the remainder of his time on policy planning, supervision of other attorneys' work, meetings, and traveling.

months during meetings with Delameter. After learning of prolonged absences and complaints by Delameter's clients, Kaufman requested that Tohtz speak with Delameter about his conduct. Tohtz and Kaufman met several times to discuss how to approach Delameter when he returned to work.

Delameter returned to work in early November 2005. On November 7, 2005, Kaufman met with Delameter because Tohtz was not in Syracuse that day. Kaufman told Delameter that he was going to be more closely supervised and that he needed to report to Tohtz. Tohtz subsequently met with Delameter to discuss his cases, and approximately once a week reported to Kaufman regarding his contacts with Delameter.

On December 23, Tohtz and Kaufman discussed the terms of a warning letter to be issued to Delameter. On December 23, both Tohtz and Kaufman met with Delameter and discussed with him the contents of the disciplinary letter they were jointly drafting, including Delameter's performance and attendance problems and his job responsibilities. Tohtz and Kaufman informed Delameter that he needed to improve his work performance by the end of January 2006, and that he could be discharged after two warnings.²⁰

Tohtz and Kaufman jointly issued a disciplinary letter to Delameter on January 3, 2006.²¹ The letter outlines Tohtz' numerous contacts with Delameter concerning Delameter's cases and Tohtz' counseling of him. The letter further states that Tohtz had to remove cases from Delameter because they had not been actively pursued. The letter required Delameter to maintain daily reports to Tohtz on his cases. Also, the letter states that Delameter had to contact Tohtz or Kaufman directly if he needed to take leave. The letter further instructs Delameter to keep Tohtz and Kaufman updated on his work and attendance, and that they planned to meet again with Delameter at the end of January 2006.

²⁰ Article 6A of the collective-bargaining agreement states that all employees are entitled to two written warnings prior to discharge.

²¹ Both Tohtz and Kaufman initialed the January 3, 2006 letter.

Tohtz determines which cases will be assigned to SAU attorneys Delameter and Murphy (Murphy obtains his own cases as well), and which cases Tohtz will take himself. Tohtz regularly meets with or contacts Delameter to discuss his caseload, and to prioritize his assignments. Tohtz provided Delameter with requested clearance to work on multiple prisoner cases which Delameter had independently acquired. Tohtz assigned Delameter referrals from the Utica LASMNY office and from other sources. He also assigned social security cases to Delameter to perform statistical work. Tohtz testified about a bankruptcy case in which he initially interviewed the client, and thereafter assigned the case to Delameter. Tohtz has also given Delameter assignments at the Onondaga County courthouse.

The record establishes that Tohtz independently decided to remove five or six cases from Delameter that he had previously assigned, due to Delameter's failure to complete them after prolonged absences from work. Tohtz worked on these cases himself. On one or two occasions, Tohtz interviewed Delameter's clients with him. On one occasion, after a client informed the Employer that she sought more expedient results in a case assigned to Delameter, Tohtz decided that Delameter should take prompt action in the case, and that they would both meet with the client.

Tohtz testified that he utilizes the bi-weekly SAU meetings as an opportunity to discuss cases with Murphy and Delameter. At the bi-weekly SAU meetings, the unit employees generally discuss whether to accept cases, how to present cases to the agencies or courts, methods of litigation as well as policy initiatives to maximize the impact of cases, determinations of resource allocations, and public relations. Murphy testified that decisions concerning these issues are made by consensus.

Tohtz testified that he provides oral reports about unit employees' job performance to Kaufman,²² but that the Employer does not utilize a formal performance evaluation system. Tohtz stated he can approve unpaid leave, but that he has not yet had the opportunity to do so.

Tohtz testified he promotes public relations policy by soliciting input from social services agencies and other sources, and by attending trips with Lupia, as discussed above, to gather information essential to promoting the representational needs of low-income clients among the counties served by the SAU. Lupia participates in policy discussions during SAU meetings, as discussed above, regarding allocation of resources relative to case acceptance and litigation strategy. However, the record does not elaborate as to when and in what specific circumstances policy decisions have been independently made by Tohtz. Tohtz testified that he has not designed or drafted any formal policy statements for SAU.

IV. Christopher Cadin: Director of Disability Advocacy Program

The Director of DAP is responsible for management of the Disability Advocacy Program grant from New York State, and for LASMNY as a grant subcontractor. The 2004 memorandum of agreement between the Employer and LASMNY provides that the Director of DAP is responsible for devising, implementing and monitoring policies and procedures which may address intake, case acceptance and assignment, case management, and case review and evaluation. Cadin is involved in formulating DAP policies and procedures. He is responsible for independently formulating a uniform policy pursuant to the Employer's DAP grant from the State, regarding the acceptance of cases by LASMNY offices involving children seeking SSI benefits. In addition, Cadin attends various DAP grant meetings where he addresses policy concerns, such as the proper reporting of HIV status cases.

²² The record does not indicate the specific nature or the exact frequency of these oral reports. Tohtz did testify, without any elaboration, that he made recommendations that "probably" influenced the Employer's retention of employees. No other witnesses testified about these recommendations.

The memorandum of agreement with LASMNY states that the DAP Director shall devise, implement and manage a system of referral of LASMNY cases to the Employer to initiate judicial review in the U.S. district courts. Cadin has developed policies and procedures related to transferring federal administrative cases from LASMNY to the Employer, where they are pursued on federal appeal and where the Employer can recover attorneys' fees. The record reveals at least twelve cases over the past two years that have been referred from LASMNY to the Employer in conformance with the policies and procedures Cadin formulated. Cadin devised referral forms which are utilized by LASMNY attorneys seeking to transfer a case to the Employer for federal appeal. He reviews LASMNY counsels' assessments about cases and makes independent determinations as to whether cases should be taken on federal appeal. Cadin independently rejected at least one federal appeal referral case. Cadin also assists the Employer's staff attorneys in the federal court litigation. He also worked with Lupia and LASMNY's Executive Director to formulate a policy to implement new evidentiary rules in social security administrative proceedings.

Cadin is responsible for overseeing the Employer's reporting requirements to New York State, through the Empire Justice Center. The memorandum of agreement also states that the DAP Director shall devise, implement and manage procedures necessary to comply with reporting requirements of funders. Cadin has independently decided to report data beyond that which is required by the State, such as a listing of the administrative law judges that heard particular cases. As part of the reporting requirements for the Empire Justice Center, Cadin forwarded a survey about intake procedures, limitations, and case load controls, which contained Cadin's own supplemental survey questions. He also issued a survey to LASMNY's employees and the Employer's employees who handle social security cases, and thereafter submitted their responses to the Empire Justice Center. Cadin testified that he utilized the information gathered from employees to recommend to Kaufman policies related to case reporting. He is responsible to

New York State for compliance with the electronic reporting requirements. As such, Cadin and Kaufman directed a technology administrator to develop a software system to assist with the electronic reporting requirements. Furthermore, Kaufman testified that Cadin is responsible for ensuring that the work subcontracted to LASMNY is appropriate, competent and of sufficient quality to satisfy the Employer obligations to New York State.

The memorandum of agreement with LASMNY states that the Employer's Director of DAP shall identify training needs and develop strategies to address those needs. Cadin provided training sessions for LASMNY employees based on the information he acquired from attending state training programs. Cadin coordinated periodic training sessions for LASMNY employees and the Employer's unit attorneys, especially those who handled social security cases, as well as for private attorneys in the community. Cadin has trained new hires by working with them closely, monitoring their cases, and attending their hearings. Cadin maintains training information on a computer system accessible to all employees. Cadin also holds monthly meetings with LASMNY attorneys pursuant to the Employer's DAP subcontract to LASMNY, to ensure LASMNY's proper performance of the subcontract. He also meets individually with LASMNY attorneys to strategize and conduct case reviews.

The Director of DAP is also responsible for maintaining contacts with other New York State providers and national providers of SSI/SSD representation. Cadin maintains contacts with the Empire Justice Center Western New York group, the State DAP group, and the National Organization of Social Security Claimants Representatives (NOSSCR). For example, Cadin attended the NOSSCR conference in 2004, as the sole representative from the Employer. Cadin attended the most recent Empire Justice Center State DAP annual conference as the only representative from the Employer. Cadin attends monthly meetings held by the Empire Justice Center Western New York group that deals with social security issues, policy matters, (such as

whether counties should establish contracts with legal service providers), and questions about particular cases.

The memorandum of agreement with LASMNY requires the DAP Director to assist in the identification of new funding sources and preparation of funding and refunding applications for SSI/SSD representation. As discussed earlier, Cadin is overseeing the development of an electronic reporting system for this purpose. He is responsible for ensuring that the Employer's social security cases are properly reported. Cadin proactively seeks to obtain increased funding from counties for DAP programs. Cadin attends meetings with county commissioners to enhance the relationship between counties and providers. The record reflects that Cadin, on his own initiative, meets with county representatives for this purpose.

V. Employees' Terms and Conditions of Employment

The record discloses that staff attorneys earn between \$31,000 and \$51,250 per year. Lupia's current annual salary is \$78,980, Tohtz' annual salary is \$71,400 and Cadin's annual salary is \$71,400.

There is a significant difference between the number of cases handled by unit employees and those handled by Lupia, Tohtz and Cadin. Lupia testified that the typical case load for a P&A unit attorney was 40 to 70 cases; and a typical case load for an SAU unit attorney was less than 40 to 70. There are no unit employees in the DPG group for comparison. Traynor testified that as of the last date of the hearing, she had 99 cases with 57 clients, and the prior year she had 147 cases with 72 clients. Lupia, at the time of the hearing, had three open cases of his own. Tohtz had between 15-20 open cases in January 2006. In December 2005, Tohtz had approximately 40 or 50 cases, many of which were carried over from prior to the reorganization, when he was a managing attorney. Cadin is currently handling approximately 10 open cases carried over from prior to the reorganization.

Unit employees, at times, engage in community outreach presentations as part of specific P&A grant requirements, such as giving training sessions provided for potential clients, service providers, and other attorneys. In addition, the record indicates various unit employees attend annual regional grant conference meetings and other annual grant-related meetings. Unit employees must comply with their particular grant's reporting requirements. Various P&A unit employees are responsible for the monthly reports required by New York State. These P&A unit employees submit only the narrative portion of the annual reports. The Executive Director, rather than unit employees, possesses overall responsibility for the submission of refunding applications, with the exception of the AIDS Law grant for which Traynor is solely responsible. In addition, unit employees also create forms or case handling procedures related to the effectuation of their grants.

ANALYSIS

Based on the record herein, I find that the Employer has met its burden of demonstrating that the Director of Advocacy and the Director of Special Advocacy Unit are supervisors within the meaning of Section 2(11) of the Act. I also find that the Employer has demonstrated that the Director of Advocacy and the Director of Disability Advocacy Program are managerial employees as defined by the Board.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) of the Act sets forth a three part test for determining supervisory status.

NLRB v. Kentucky River Community Care, Inc., et al., 121 S.Ct. 1861, 1867 (2001). Employees are statutory supervisors if: “(1) they hold the authority to engage in any one of the twelve listed

supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” Kentucky River, *supra*, 121 S.Ct. at 1867.

Possession of any one of the statutory indicia outlined in Section 2(11) is sufficient to confer supervisory status on an employee. Palagonia Bakery Co., Inc., 339 NLRB 515, 534 (2003). Such indicia will not establish supervisory status unless it is exercised with independent judgment, rather than in a routine or clerical manner. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). The exercise of “some supervisory authority in a merely routine clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees” does not confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), *enfd.* in relevant part 794 F.2d 527 (9th Cir. 1986).

In Kentucky River, *supra*, the Supreme Court overruled Board precedent, which provided that the “professional or technical” judgment used by professionals who directed less skilled employees” is not “independent judgment.” Kentucky River, *supra*, 121 S.Ct. at 1868-71. The Court held that the nature of the judgment, whether professional, technical or experimental, does not determine whether judgment is “independent.” The Supreme Court did not hold that every exercise of professional or technical judgment requires “independent judgment,” and recognized that the Board must determine the degree of “independent judgment” that establishes supervisory status. *Id.* at 1867-68. The Supreme Court also held that, where an employee’s assignment and direction of others is based on the employer’s pre-existing orders, his/her “independent judgment” may become minimized to such an extent that he/she is not a supervisor. *Id.* at 1867.

The burden of proving that an employee is a statutory supervisor or managerial employee is on the party alleging such status. Kentucky River, *supra*; Allstate Insurance Co., 332 NLRB 759 (2000). Lack of evidence, or conflicting or inconclusive evidence, is construed against the party asserting supervisory status. Michigan Masonic Home, 332 NLRB 1409 (2000); Phelps

Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. See Sears, Roebuck & Co., 304 NLRB 193 (1991).

The Board has traditionally defined managerial employees as those employees with discretion to “formulate and effectuate management policies by expressing and making operative the decisions of the employer,” and those “who have discretion in the performance of their jobs, but not if the discretion must conform to an employer’s established policy.” NLRB v. Bell Aerospace, 416 U.S. 267, 286, 289 (1974). An employee may be excluded as managerial only if he represents “management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” Allstate Insurance Co., 332 NLRB 759, 762 (2000), *quoting* NLRB v. Yeshiva University, 444 U.S. 672, 682-3 (1980). Managerial employees “must exercise discretion within, or even independent of, established employer policy and must be aligned with management.” NLRB v. Yeshiva University, 444 U.S. 672, 683 (1980). Also, “managerial status” is “reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.” General Dynamics, 213 NLRB 851, 857 (1974).

It should be noted that “managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction.” General Dynamics, *supra*, at 857-8. However, the Supreme Court has rejected the contention that decisions based on professional judgment cannot be managerial. Yeshiva University, *supra*, at 687. A managerial employee may have some limits on his discretion. See ITT Grinnell, 253 NLRB 584, 584-5 (1980) (even though the managerial employee was not empowered unilaterally to extend credit, he exercised discretion in the resolution of payment disputes, and in granting invoice concessions); Simplex Indus., Inc., 243 NLRB 111,

111-12 (1979) (an employee who follows an industry-established criteria is still a managerial employee, because his discretion is not narrowly circumscribed by the employer's set policies).

The Board has previously addressed the issue of whether attorneys can be characterized as supervisors or managerial employees. For example, in Northwest Florida Legal Services, 320 NLRB 92 (1995), the Board adopted an administrative law judge's decision that a managing attorney was a supervisor within the meaning of Section 2(11) of the Act. The managing attorney, who was regularly in charge of the employer's operations during the executive director's absence, directly participated as a negotiator during collective-bargaining negotiations, suspended a unit employee, approved leave slips, evaluated employees, and attended supervisory meetings. In contrast, the senior attorney did not exercise supervisory authority, where his exercise of responsibilities in relation to other employees was routine in nature. More specifically, the senior attorney did not assign cases, or review case work, and engaged in routine safety checks of paperwork in case files, and attended supervisory meetings with unit heads that generally only encompassed administrative topics. Id. at 93-94.

In Legal Aid Bureau, Inc., 319 NLRB 159 (1995), the Board adopted an administrative law judge's finding that the employer's supervisory attorneys were Section 2(11) supervisors. The administrative law judge noted that the job description for the position demonstrated their "obvious supervisory authority," and that the employees exercised independent judgment in effectively recommending discipline, directing employees, and evaluating employees. The administrative law judge also found that the fact that employees at issue performed tasks associated with bargaining unit work did not warrant the conclusion that they were not supervisors. Id. at 161-3.

The Petitioner relies on Neighborhood Legal Services, Inc., 236 NLRB 1269 (1978), and Ohio State Legal Services Assoc., 239 NLRB 594 (1978), to argue that the employees at issue should be included in the unit.

In Neighborhood Legal Services, Inc., 236 NLRB 1269 (1978), the Board held that unit head attorneys of a legal services provider were neither supervisors nor managerial employees. Intake procedures channeled cases to the appropriate staff attorney. The supervisory director of litigation and training, and supervisory assistant trainer, rather than the unit head attorneys, met monthly with employees in each unit to ascertain the status of cases, review cases, and direct case handling. The unit heads, who did not earn extra compensation, attended weekly staff meetings with the executive director, director of litigation and training and unit employees. Unit heads lacked the power to effectively recommend personnel actions, and their recommendations were followed only after independent consideration by the executive director, who retained sole authority for personnel actions. The Board held that the unit heads performed merely routine clerical duties that lacked independent judgment, such as validating time cards and preparing unit staff reports. Moreover, the Board found that the unit heads were not managerial employees, expressing that the executive director possessed the sole authority to formulate, determine and effectuate policy, and that he made decisions regarding matters, such as law reform, following his own independent judgment and review. The unit employees played “at best an informational or professional advisory role” and the executive director considered their input based upon their professional expertise. Id. at 1271-1273.

In Ohio State Legal Services Assoc., 239 NLRB 594 (1978), the Board rejected the employer’s contention that three employees were supervisors and/or managerial employees. Regarding the employees’ supervisory status, the Board found that their authority and independent judgment in personnel actions were circumscribed by independent reassessment by superiors, and that their direction of other employees in a cooperative environment was a function of experience and expertise rather than their vested authority. The Board also found that the employees were not managerial employees, inasmuch as their work merely influenced the employer’s direction, and they did not have the actual authority to formulate, determine, and effectuate management policies.

Id. at 598. The Board noted that the positions were subject to institutional limitations and were subject to supervision in the duties which allegedly evinced managerial status. Id. at 598 n.20.

Both Neighborhood Legal Services, *supra*, and Ohio State Legal Services, *supra*, are distinguishable from the present case, as explained *infra*.

A. Director of Advocacy: Paul Lupia

Initially, I note that the record establishes that Lupia does not transfer, suspend, lay off, recall, promote, discharge, reward, evaluate employees or adjust grievances. The Employer contends that the Director of Advocacy is a supervisor based on the authority to effectively make recommendations regarding the hiring of new staff attorneys, and to assign and responsibly direct the work of staff attorneys.

I conclude that Lupia is a supervisor within the meaning of Section 2(11) of the Act because he effectively recommends hiring, as well as assigns and responsibly directs the work of the Employer's attorneys. I further conclude that Lupia is a managerial employee as defined by Board law.

The record indicates that Lupia possesses and exercises authority to effectively recommend hiring. The Board has found supervisory status based upon an individual's ability to effectively recommend hiring, utilizing independent judgment. Fred Meyer Alaska, Inc., 334 NLRB 646, 649 (2001); Queen Mary, 317 NLRB 1303 (1995). Hiring recommendations that are based upon an employee's own assessment of the necessary skills, and whether the candidates possess the appropriate skills or qualifications for a position involves the use of independent judgment. Fred Meyer, *supra*, at 649. The power to effectively recommend means that the recommended action is taken without an independent investigation of the relevant circumstances by superiors. Chevron USA, Inc., 309 NLRB 59, 65 (1992). In Fred Meyer, *supra*, at 649, the Board held that the possession of authority to effectively recommend hiring is sufficient to establish supervisory status, even if this authority has not yet been exercised.

In Detroit College of Business, 296 NLRB 318, 319 (1989), the Board found that coordinators had the authority to effectively recommend the hiring of instructors, when the hiring process was described as a joint effort between the coordinator and management. The record in that case showed that hiring was a “joint decision” between the associate dean and the coordinator. Both the associate dean and the department coordinator participated in the interview of candidates, and the coordinator made a recommendation regarding the candidate after the interview. The record in that case also showed that the associate dean had not hired any instructor without the consent of the department coordinator. The Board concluded that the coordinator was a supervisor, despite two instances in which the dean had not followed the coordinator’s hiring recommendations. Id.

Lupia possesses authority, and exercised the authority, to effectively recommend hiring. For example, Lupia’s job description states that he is responsible for “assisting the Executive Director in the recruitment and selection of staff.” The Executive Director testified that he sought Lupia’s assessment of job candidates’ skills and qualifications. Fred Meyer, supra, at 649. As in Detroit College of Business, supra, at 319, where the hiring process was described as a joint effort, Lupia and Kaufman, and for the SAU job opening, Tohtz, jointly interviewed, ranked and selected candidates to extend offers of employment. The record does not indicate that Kaufman separately evaluated Lupia’s independent employment background checks, or that Kaufman engaged in an additional assessment of candidates by himself after the joint deliberation. Chevron, USA, supra, at 65. Lupia did more than merely participate in the hiring process in a routine and clerical fashion; he actively engaged in the process, and exercised independent judgment in effectively recommending hiring decisions. Fred Meyer, supra; Queen Mary, supra.

In Kentucky River, supra, at 1867, the Supreme Court noted that where an individual assigns or directs work based on detailed orders or regulations issued by the employer, the degree

of judgment may be reduced below the required statutory threshold. The Supreme Court suggested that “responsible direction” could be defined “by distinguishing employees who direct the manner of others’ performance of discrete tasks, from employees who direct other employees, as Section 2(11) requires.” Kentucky River, *supra*, at 1871.²³

In Franklin Home Health Agency, 337 NLRB 826, 831 (2002), *citing* Schnurmacher Nursing Home, 214 F.3d 260, 267 (2d Cir. 2000), the Board held that in determining responsible direction, it examines “whether the alleged supervisor is held accountable for the performance and work product of employees they direct.” Furthermore, in Franklin Home, *supra*, at 830, the Board held that “the assignment of tasks in accordance with an employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition.”

Kaufman testified that Lupia has the authority, as outlined in the Director of Litigation’s duties, to “supervise and manage the litigation of the agency,” as well as to “conduct periodic case reviews with attorneys and paralegals in the agency to insure overall quality of work and compliance with the Employer’s policies and procedures.” Lupia regularly meets with P&A unit employees to discuss their cases. The record also establishes that immediately upon taking his position, Lupia individually reviewed caseloads with the DPG employees.

Kaufman also testified that Lupia had the authority to “work with the senior attorneys to monitor case acceptance and rejection policies of the units” and “serve as a resource person for

²³ The court in Kentucky River, *supra*, referred to Providence Hospital, 320 NLRB 717, 729 (1996), as a basis for that distinction. In Providence Hospital, *supra*, at 729, the Board held:

Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee’s ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

litigation questions from staff.” Although P&A unit employees usually receive their cases from the intake process rather than by direct assignment by Lupia, Lupia plays a critical role in their processing. The record is replete with examples of Lupia providing responses to numerous substantive legal inquiries. Lupia testified that in one matter involving an Article 78 case, that if the unit employee had disagreed with him, he would have directed him to follow his advice. The unit employee made the changes to his documents as directed by Lupia. In addition, Lupia decided that a P&A unit attorney should contact another organization’s attorney about a potential appeal filing. Kaufman testified that Lupia has the authority to refuse to take a case brought to a weekly P&A unit meeting. Lupia directed a unit attorney to accept a Client Assistance Program case during one P&A meeting. In all of these contacts with unit employees, Lupia makes an independent evaluation of the problems presented for his evaluation, and responsibly directs unit employees to follow a course of action involving litigation. Lupia does not merely follow detailed orders or regulations. Kentucky River, *supra*, at 1867, 1871.

As was the case with the managing attorney found to be a supervisor in Northwest Florida Legal Services, 320 NLRB 92, 93 (1995), Lupia is regularly in charge of the Employer’s operations during Kaufman’s absence, during which he attends management meetings. Lupia acts as a chairperson of the P&A meetings, when Kaufman is absent. Kaufman testified that, in accordance with the Director of Litigation job description, Lupia possesses the authority to “direct day to day operations of the agency in absence of the Executive Director.” Unlike the senior attorney in Northwest Florida, *supra*, at 93-94, Lupia reviews case work, at times makes decisions about which cases will go forward, attends supervisory meetings that address other than administrative matters, and engages in more than routine checks of employees’ case files.

Unlike the unit head attorneys in Neighborhood Legal Services, 236 NLRB 1269 (1978), discussed above, Lupia performs more than routine clerical duties related to the evaluation of cases; and, unlike the senior attorney in Ohio Legal Services, Inc., 239 NLRB 594 (1978),

discussed above, Lupia provides more than simply “informed advice” to unit employees. Contrary to Petitioner’s arguments, Lupia serves in more than the “informational and professional advisory role” of the employees at issue in Neighborhood Legal Services, Inc., *supra*, at 1273.

The Petitioner argues that Lupia’s contacts with unit employees mirror the collegial mentoring prevalent among unit employees.²⁴ However, Lupia, unlike unit employees providing collegial advice to each other, has the responsibility to “supervise and manage” and to “serve as a [litigation] resource person” for unit employees. As such, he is accountable to the Employer as a “litigation supervisor.” Franklin Home Health Agency, 337 NLRB 826, 831 (2002). Lupia attends both P&A meetings and SAU bi-weekly meetings, so that he is aware of the totality of the Employer’s litigation. As noted above, Lupia has the authority to assign cases and to reject cases for handling by staff attorneys. He decides which cases will go forward and, from time to time, directs attorneys to take specific actions in their cases. Thus, the record establishes that Lupia gives unit attorneys more than mere “collegial advice” and has responsibilities beyond that of a mentor. Accordingly, I conclude that the Director of Advocacy assigns and responsibly directs the work of the Employer’s attorneys.

The Executive Director testified without contradiction that Lupia possesses the authority to recommend discipline, although he has not had the opportunity to exercise that authority. The only instance of discipline since the Employer’s reorganization occurred in the SAU unit, a unit for which Tohtz, rather than Lupia, has direct responsibility. Thus, the record does not reveal an opportunity for Lupia to have exercised any disciplinary authority. The Board has held that it is the existence of supervisory authority, not its exercise, that determines whether an employee is a supervisor. Allstate Insurance Co., 332 NLRB 759, 760 (2000); Legal Aid Bureau, Inc., 319

²⁴ Advice given by senior or experienced employees to others as to how a job is to be performed is not an indicum of supervisory authority. Local Union No. 195 (Jefferson-Chemical Co., Inc.), 237 NLRB 1099, 1102 (1978) (attention paid to the individual’s opinions or recommendations based upon deference to his expertise, rather than to his delegated authority, was not an indicator of supervisory status).

NLRB 159, 161 (1995). Lupia's authority to recommend discipline serves as evidence of having satisfied Section 2(11) indicia. Mountaineer Park, Inc., 343 NLRB no. 135, slip op. at 4 ("The authority to recommend discipline can bestow supervisory status"). Accordingly, I conclude that the record establishes that the Director of Advocacy has the authority to effectively recommend discipline.

Secondary indicia, such as differences in terms and conditions of employment, attendance at management meetings, or perception of others, can be relied upon as background evidence of supervisory status. North Shore Weeklies, Inc., 317 NLRB 1128 (1995); McClatchy Newspapers, Inc., 307 NLRB 773, 779 (1992); Chevron USA, Inc., 309 NLRB 59, 70 (1992). Here, Lupia is paid more than unit employees. He attends various management meetings, dealing with the impact of the reorganization and a variety of staffing issues, and he attends Employer board meetings. Furthermore, one employee testified that the Employer informed her that Lupia was her supervisor, and that she conveyed that position to other employees. In addition, Lupia engaged in demonstrably less casehandling than unit employees. These secondary indicia buttress the finding of supervisory status. McClatchy, *supra*.

I find that Lupia is also a managerial employee, who exercises discretion in formulating and effectuating policies that express the decisions of the employer. NLRB v. Bell Aerospace, 416 US 267, 286 (1974). Lupia is responsible for developing a plan to encourage and support major litigation in the office, such as class action litigation. He is required to work with the Executive Director to formulate policies, procedures, and standards relevant to the work performed by the Employer. Lupia traveled to LASMNY offices following the Employer's reorganization, to meet with LASMNY staff to ensure that the appropriate cases would be referred to the Employer. In contrast, the unit employees' educational outreach commitments and attendance at community meetings are pursuant or related to particular grant requirements.

Lupia is the Employer's representative at meetings with other public interest groups and service providers where he expresses the Employer's policy concerns and interests, such as coordinating Medicaid issues, and the Employer's interest in related litigation in appropriate cases. Lupia, as the Employer's representative, attended a statewide meeting of public service agency directors to address raising funds for training purposes. Furthermore, at Employer management meetings, Lupia facilitated the resolution of issues involving the effectuation of the reorganization, such as buy-back arrangements for employees and office-sharing arrangements. He also has participated in management meetings involving discussions of Employer strategy for collective-bargaining negotiations. Thus, the record establishes that Lupia is closely aligned with management and is a true representative of management. General Dynamics, *supra*, at 857.

Accordingly, I conclude that the Director of Advocacy is a supervisor within the meaning of Section 2(11) and a managerial employee as defined by Board law.

B. Eric Tohtz: Director of Special Advocacy Unit

The Employer contends that Eric Tohtz, Director of Special Advocacy, is a Section 2(11) supervisor because he makes effective hiring and disciplinary recommendations, as well as assigns and responsibly directs the work of staff attorneys. The Employer also asserts that he is a managerial employee because of his considerable authority and discretion in formulating, determining and effectuating Employer policies. I find that Tohtz effectively recommends hiring and discipline, and that he assigns and responsibly directs staff attorneys. As such, I find that he is a supervisor within the meaning of Section 2(11) of the Act. However, I do not find that he is a managerial employee under Board law.

The record establishes that Tohtz, like Lupia, jointly and actively engaged in the hiring process, and effectively recommended candidates for hire in the SAU. The record reflects that Tohtz played an integral role in the screening of resumes, interviewing, ranking and in the final selection of candidates and determination of offers for the SAU position. The record also reflects

that the Executive Director specifically sought Tohtz' particular inclusion in the process assessing the candidates for the SAU position. The record reflects that the Employer did not make ultimate hiring decisions for the SAU position, without Tohtz' consent. The witnesses' testimony that Tohtz "jointly decided" to offer positions, places these decisions beyond mere participation in the hiring process. Detroit College of Business, 296 NLRB 318, 319 (1989). There is no evidence that Kaufman overrode the selection of candidates, after Tohtz, Lupia and Kaufman concurred in the decision to extend offers to SAU candidates. Chevron USA, Inc., 309 NLRB 59, 65 (1992). Thus, the record reflects that Tohtz utilized independent judgment in effectively recommending hiring.²⁵ Fred Meyer Alaska, Inc., 334 NLRB 646, 649 (2001); Queen Mary, 317 NLRB 1303 (1995).

Kaufman testified that Tohtz has the authority to discipline and that he would afford Tohtz' recommendations great weight.²⁶ Tohtz testified that he understood that he possessed such disciplinary authority. The authority alone would constitute evidence of supervisory indicia. Mountaineer Park, *supra*, slip op. at 4. In addition, Tohtz effectively recommended to Kaufman that the Employer take action concerning a SAU attorney's work performance. Tohtz also counseled the SAU attorney about his work performance. Tohtz and Kaufman met with and jointly discussed the work performance issues with the SAU attorney, and informed him that he needed to improve his work performance and that he could be discharged after two warnings. Thus, Tohtz did more than merely report an employee's misconduct to Kaufman. Tohtz also jointly drafted with Kaufman the terms of a disciplinary letter to the attorney detailing his

²⁵ The mere fact that Kaufman participates in the hiring process along with Tohtz and Lupia does not affect the evaluation of the supervisory status of Tohtz. See Queen Mary, 317 NLRB 1303, 1303 n. 4 (1995) (the involvement of the plant manager in the hiring process did not impact the finding that the chief engineer effectively recommended hiring); Fred Meyers, *supra*, at 648-9 (even though food manager sat in on interviews with meat manager, meat manager still found to be supervisor).

²⁶ Even if employees do not issue discipline entirely on their own, they are supervisors if they use independent judgment in effectively recommending discipline. Mountaineer Park, Inc., 343 NLRB No. 135, *supra*, slip op. at 3 (The director of housekeeping signed off on disciplinary recommendations made by assistant supervisors, without conducting a separate investigation).

misconduct. The discipline was jointly initiated by Tohtz and Kaufman. The disciplinary letter was initialed by, and addressed from both, Tohtz and Kaufman. Accordingly, the record establishes that Tohtz has effectively recommended the discipline of employees.²⁷ Mountaineer Park, *supra*, slip op. at 3-4.

The record reflects that Tohtz assigns and responsibly directs the work of the SAU attorneys. The selection of a particular employee to perform a specific task based upon the employee's abilities illustrates the exercise of independent judgment in work assignments. Palagonia Bakery Co., Inc., 339 NLRB 515, 534-5 (2003). An employee engages in independent judgment in assignments when discretion in assigning specific jobs is not limited or circumscribed by the Employer. Mays Electric Co., 343 NLRB No. 20, slip op. at 5 (2004).

The record establishes that Tohtz independently decided to remove five or six assigned cases from an SAU attorney because of the attorney's work performance issues. Also, Tohtz determined which cases to assign to himself, a less experienced attorney and a senior SAU attorney, thus exhibiting discretion that was not circumscribed by the Employer. Mays Electric Co., *supra*; Palagonia, *supra*. Tohtz gave an SAU attorney permission to pursue certain cases, and has assigned referred cases for statistical work, assigned bankruptcy cases and prioritized an attorney's assignments. The record also establishes that Tohtz directed an attorney to expedite his assistance to a client and to schedule a meeting with the client. Tohtz has met with an SAU attorney on numerous occasions to assess his progress on his assignments. The record thus establishes that Tohtz responsibly directs and assigns work with independent judgment. Franklin Home Health Agency, 337 NLRB 826, 831 (2002); Legal Aid Bureau, Inc., 319 NLRB 159, 161-2 (1995).

²⁷ While Tohtz testified that he has made recommendations to the Executive Director that "probably" influence the Employer's retention of employees, the record does not disclose any further testimony or evidence in this regard. Such vague and speculative testimony is insufficient to establish that Tohtz effectively evaluates employees for purposes of retention.

Tohtz has the authority to approve unpaid leave for SAU attorneys. In addition, Tohtz' salary and his reduced caseload relative to the case loads of the SAU attorneys is secondary indicia that supports a finding of his supervisory status. North Shore Weeklies, Inc., 317 NLRB 1128 (1995).

Accordingly, I conclude that Tohtz is a supervisor within the meaning of Section 2(11) of the Act.

However, I conclude that the record does not establish that Tohtz is a managerial employee. Tohtz has not formulated any policy statements for SAU. While the record does show that he has been generally involved in policy regarding public relations and resource allocation, the record does not reveal the extent or nature of Tohtz's participation in Employer policy formulation. Tohtz's investigation of the legal issues facing low-income residents in the SAU-covered counties, and his participation in the discussions of cases at SAU meetings does not sufficiently reflect discretion in policymaking. Thus, the record does not establish Tohtz independently formulates and effectuates management policies. He does not exercise the discretion necessary with established Employer policy to be labeled a managerial employee. NLRB v. Yeshiva University, 444 U.S. 672, 682-3 (1980).

C. Christopher Cadin: Director of Disability Advocacy Program

The Employer contends that Christopher Cadin, Director of the Disability Assistance Project, is a managerial employee responsible for effectuating and formulating policy with respect to the Employer's contract with the New York State for DAP.²⁸

A managerial employee formulates, determines, and effectuates management policies by expressing and making operative the decisions of the employer, and possesses discretion to perform job duties independent of the employer's established policies. NLRB v. Yeshiva

²⁸ The Employer does not contend, and the record does not establish, that Cadin is a supervisor within the meaning of Section 2(11) of the Act.

University, supra. The Employer-LASMNY memorandum of agreement outlines the Director of DAP's managerial duties:

1. responsibility for devising, implementing and monitoring policies and procedures that address intake, case acceptance and assignment, case management, as well as case review and evaluation; 2. establish systems to monitor and track DAP advocacy work; 3. identify training needs and develop strategies to address those needs; 4. maintain contacts with other state providers and national providers; 5. devise, implement and manage a system of referral of LASMNY cases to the Employer.

The record evidence establishes that Cadin fulfills these outlined responsibilities, which include formulation and effectuation of Employer policy. NLRB v. Yeshiva University, supra. Regarding case acceptance, Cadin independently formulated a policy regarding acceptance of child SSI cases by LASMNY offices, pursuant to his responsibility in overseeing the Employer's subcontract to LASMNY. Cadin represents the Employer at DAP meetings, Empire Justice Center Western New York meetings, and NOSSCR meetings, where policy matters are discussed. In Simplex Industries, Inc., 243 NLRB 111, 112-3 (1979), the Board held that a buyer responsible for purchasing scrap paper was a managerial employee where he performed his duties without the assistance of employer-imposed procurement policies, and with the discretion only limited by the quality control department. The employer authorized the buyer to initiate contacts with new suppliers and to change suppliers unilaterally. Just as the managerial buyer initiated new contacts in Simplex, supra, Cadin solicits business, by independently making contacts with county commissioners to advocate the establishment of contracts with LASMNY, the Employer's DAP grant subcontractor, and as part of his search for new funding sources. Cadin's efforts in this regard promotes the Employer's interests in its primary contract with New York State regarding the DAP grant.

As part of formulating a policy regarding LASMNY referrals to the Employer, Cadin independently determines which cases are referred to the Employer for that purpose, and for which

the Employer can recover attorney's fees. Cadin devised referral forms which are utilized as part of the process. The record reflects Cadin's discretion in rejecting a referred case.

In addition, Cadin worked on developing an Employer and LASMNY policy regarding the application of new evidentiary rules in social security administrative proceedings. He developed a survey about intake procedures, limitations, and case load for LASMNY employees and the Employer's employees as part of New York State reporting requirements, and for use in developing policies regarding case reporting. Cadin also utilized his own discretion in gathering and reporting data, beyond the reporting requirements of New York State for the DAP grant. Furthermore, Cadin coordinated training sessions for the Employer's employees and for LASMNY employees, thereby implementing the Employer's DAP training policy.

The Petitioner argues that Cadin is not a managerial employee, in part because Cadin's job duties are similar to those of unit employees, as was the case in Neighborhood Legal Services, 236 NLRB 1269, 1273 (1978); that he merely influenced the Employer's direction of policy, as was the case in Ohio State Legal Services, 239 NLRB 594, 598 (1978); and that Cadin's discretion is limited by the governmental entities providing the grant. The record establishes, however, that Cadin's job duties and working conditions are markedly different from those of the unit employees. Unlike the unit employees, the record establishes that Cadin administers a general contract between two different agencies, is responsible for DAP reporting requirements to the State's Empire Justice Center, which involve surveying the Employer's employees who process certain disability cases and LASMNY employees, and develops training programs for both Employer and LASMNY employees. Cadin handles a lesser caseload, and earns a higher salary, than unit employees.

Unlike the employees at issue in Ohio State, *supra*, Cadin actually possesses well-outlined managerial authority and has exercised the authority to formulate Employer policies. Unlike the unit head attorneys in Neighborhood Legal Services, *supra*, Cadin does not play merely an

“informational or professional advisory role,” but rather exhibits significant discretionary decision-making in formulating and effectuating the policies of the Employer related to the administration of the DAP. Unlike the executive director in Neighborhood Legal Services, *supra*, the Employer’s Executive Director does not exercise sole authority to formulate policy. Cadin’s interests are more closely aligned with management than with unit employees. NLRB v. Yeshiva University, *supra*, at 682-4. As such, I find the Director of DAP is a managerial employee, and should be excluded from the unit. Simplex Industries, Inc., 243 NLRB 111, 113 (1979).

D. Conclusion

Based on the foregoing and the entire record evidence, I conclude that the bargaining unit should not be clarified to include the Director of Advocacy, because of his supervisory and managerial status; the Director of Special Advocacy, because of his supervisory status; and the Director of the Disability Advocacy Program, because of his managerial status. Accordingly,

ORDER

IT IS HEREBY ORDERED that the Unit Clarification petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **August 10, 2006**.

Dated at Buffalo, New York this 27th day of July 2006.

CHARLES J. DONNER, Acting Regional Director
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